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October Term, 1972

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On Appeal from the United States District Court for the Northern District of Texas

and

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Appellants,

v.

ARTHUR K. BOLTON, AS ATTORNEY GENERAL OF THE STATE OF GEORGIA, ET AL.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

INTEREST OF AMICUS CURIAE

Since the law of the Commonwealth of Virginia relating to abortions parallels the provisions of the Georgia statute

struck down in *Doe* v. *Bolton,* ..... U.S. ..... (1973), the issues presented in that case and in *Roe* v. *Wade,* ..... U.S. ..... (1973), are of great importance to the people of Virginia.

ARGUMENT

The principle of separation of powers is fundamental to the very existence of constitutional government as established in the United States. The unique place and character of judicial review in our governmental framework are found in the "delicacy of that function, particularly in view of possible consequences for others . . .; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process . . .; withal in the paramount importance of constitutional adjudication in our system." *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U.S. 549, 571 (1947).

In deciding *Roe* v. *Wade,* ..... U.S. ..... (1973), the Court recognized at page 1 and page 44 of the slip opinion the "sensitive and emotional nature of the abortion controversy," the "vigorous opposing views, even among physicians," the "deep and seemingly absolute convictions that the subject inspires," and the wide divergence of opinion on the "difficult question of when life begins." Nevertheless, as Mr. Justice Holmes stated in his now famous dissent in *Lochner* v. *New York,* 198 U.S. 45, 75 (1905):

> "This case is decided upon [a] . . . theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up

> my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."

It is not the function of the Supreme Court of the United States under the authority of the Fourteenth Amendment to supervise the legislation of the States in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes. *Jones* v. *City of Portland*, 245 U.S. 217, 224 (1917). And as Mr. Justice Rehnquist recognized on page 4 of the slip opinion in his dissent in *Roe*, "adoption of the compelling state interest standard will inevitably require the Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward is 'compelling.' The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the state may impose in each one, . . . , partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."

Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe reasonable regulations to pro-

mote the health, peace, morals, education and good order of the people. *Barbier* v. *Connolly,* 113 U.S. 27, 31 (1885). This power is one of the least limitable of the powers of government. *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, 83 (1945). No better words can be used to describe the concept of the police power of the State, than selected passages from the case of *Jacobson* v. *Massachusetts,* 197 U.S. 11, 24-26 (1905), in which the Court upheld the validity of the Massachusetts statute requiring vaccination against smallpox:

> "The authority of the State to enact this statute is to be referred to what is commonly called the police power —a power which the State did not surrender when becoming a member of the Union under the Constitution. . . . According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. . . . The mode or manner in which those results are to be accomplished is within the discretion of the State; . . . [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. . . . This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State. . . .' " (Citations omitted.)

The Court's holdings in *Roe, supra,* and its companion case, *Doe* v. *Bolton,* ..... U.S. ..... (1973), are an unprecedented and unwarranted intrusion by the judiciary into the power and responsibility of the legislature to protect the public health, safety, welfare and morals of its citizens. The Court's decisions in these cases precludes the State from

adopting a theory of life which a substantial number of its citizens accepts. Contrary to Mr. Justice Holmes' admonition, the Court has adopted the socio-medical-legal theory that "life" is too insubstantial to allow the State under the Constitution to grant protection from arbitrary destruction visited upon embryonic life prior to the time of viability. "[A] legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone." *Roe, supra,* at 35 (slip opinion). Moreover, it is "unfair to argue that because the early focus was on preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal life is to be downgraded. That argument denies the State the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day." *Doe, supra,* at 10 (slip opinion).

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia, respectfully submits that this Court should grant appellees petitions for rehearing in the cases of *Roe* v. *Wade* and *Doe* v. *Bolton,* decided January 22, 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on or before the 16th day of February, 1973, I mailed by Airmail three copies of the foregoing Brief to Margie Pitts Hames, Suite 822, 15 Peachtree Street, N.E., Atlanta, Georgia 30303; Reber Boult, Jr., Charles Morgan, Jr., ACLU, Foundation, Inc., 52 Fairlie Street, Atlanta, Georgia 30303; Elizabeth R. Rindskopf, Gale M. Siegel, 185 Central Avenue, S.W., Atlanta, Georgia 30303; Tobiane Schwartz, 153 Pryor Street, S.W., Atlanta, Georgia 30303. All parties required to be served have been served.

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